No. 09-210

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT E. FRAZIER,

Petitioner,

v.

KATHLEEN SEBELIUS, Secretary,
U.S. Department of Health and Human Services,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully moves this Court for an order (1) vacating its order of October 13, 2009 which denied the petition for certiorari filed by petitioner on August 14, 2009 and (2) granting the petition for writ of certiorari. The grounds for rehearing are stated below. These grounds were not presented previously in view of the Court's well known preference for brevity, the number of issues previously presented, and the Court's consistently stated policy to refrain from passing on questions of constitutionality . . . unless such adjudication is unavoidable. *New York City Transit Authority v. Beazer,* 99 S. Ct. 1355, 440 U.S. 568, 59 L. Ed. 2d 587 (1979).

REASONS FOR GRANTING REHEARING

Substantial grounds exist which were not previously presented.

I. 42 U.S.C. § 1395ii (amend. Aug. 15, 1994) (Application of certain provisions of subchapter II) violates the U.S. Const. It is void for vagueness in violation of U.S. Const. amend. [I], right to petition the government for redress of grievances through meaningful access to the courts, denies due process in violation of U.S. Const. amend. [V], and denies equal protection of the laws under U.S. Const. amend. [XIV]. It does not identify and inform a Medicare appellant of common intelligence of its subject matter.

42 U.S.C. § 1395ii. Application of certain provisions of subchapter II:

> "The provisions of sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (h), (i), (j), (k), and (*l*) of section 405 of this title, shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter, except that in applying such provisions with respect to this subchapter, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively." (Aug. 15,

1994, Pub.L. 103-296, Title I, § 108(c)(4), 108 Stat. 1485.)

42 U.S.C. § 406. Representation of claimants before Commissioner of Social Security: This statute is lengthy and is set forth in ten pages in the Ninth Circuit Court Answering Brief, Addendum pages 5 to 10, most of which deals with appeals involving Social Security benefits and the limitations on fees of representatives and attorneys to 25% of "past due benefits" or $4,000, whichever is the lesser. It gives the Commissioner of Social Security the power by rule or regulation to control representative's fees and to set maximum fees and section (3)(C)(5) makes it a misdemeanor crime to charge or collect any fee in excess of the maximum fee. Conviction is punishable by fine not exceeding $500 or by imprisonment not exceeding one year or both.

§ 406(C) Provides: The Commissioner of Social Security shall notify each claimant in writing together with the notice to such claimant of an adverse determination, of the options for obtaining attorneys to represent individuals in presenting their cases before the Commissioner of Social Security. Such notifications shall also advise the claimant of the availability to qualifying claimants of legal services organizations which provide legal services free of charge.

42 U.S.C. § 1395ii is unconstitutionally vague, indefinite, and does not inform a Medicare + Choice (since renamed Medicare Advantage "MA") enrollee of

ordinary common intelligence that section 406 of this title affords him a possible substantial right to free legal representation through the availability to qualifying claimants of legal services organizations which provide legal services free of charge. This would insure him of meaningful access to the courts with an attorney to guide him through the labyrinth of substantive and procedural statutes, regulations, rules, and federal court appeals.

Section 1395ii does not mention the word attorney, representative, appeals, legal help, assistance, legal services free of charge, or any other word that would alert the reader to the subject matter of § 406.

Meaningful access to the courts is a fundamental constitutional right grounded in the First Amendment right to petition the government for redress of grievances. Section 1395ii also violates the Fifth and Fourteenth Amendments rights to due process and equal protection. Although this issue has been raised more often by persons incarcerated, it is clear that access to the courts without undue interference and restraints is a First Amendment right of an individual whether free or incarcerated. See *Boddie v. Connecticut*, 91 S. Ct. 780, 401 U.S. 371, 28 L. Ed. 2d 113 (1971).

Due process requires that persons who are forced to settle their claims through the judicial process be given a meaningful opportunity to be heard. This would logically include meaningful notice of the right to an attorney. Due process also

requires that insufficiently clear laws and regulations be held void for vagueness. *Grayned v. City of Rockford*, 92 S. Ct. 2294, 408 U.S. 104, 108, 33 L. Ed. 2d 222 (1972). A vague statute that implicates First Amendment freedoms discourages the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked. *Id.* at 109. Vagueness causes attorneys to steer clear of representation in Medicare MA appeals for fear of possible sanctions or prosecution for charging customary and reasonable but unlawful fees.

Petitioner was not aware of the connection between § 1395ii and § 406 until it was disclosed in the Secty's District Court last brief permitted to which petitioner had no opportunity to reply in the district court. This P.&A. brief, Docket #41, page 23, July 21, 2006, was filed over three years after the administrative hearing was held on November 19, 2002.

Petitioner was unable to obtain an attorney under any circumstances, and his efforts are set forth in his 9th Circuit Motion for appointment of an attorney on Sept. 27, 2007, Docket #24, and denied Nov. 16, 2007, Docket #27.

The high cost of medical care is common knowledge among the 300 million residents of our nation whose representatives and senators in the Congress are now grappling with this issue of how to bring down the cost of $250,000 heart transplants and

other very expensive transplants and costly treatments such as petitioner's prostate cancer treatment and at the same time insure adequate medical treatment for all.

The adoption of an important statute by reference only to a number without notice of its subject matter is unconstitutionally vague. Section 406 was designed to protect Social Security Claimants for disability pensions and SSI benefits for the poor, from predator attorneys. Applying this statute to Medicare + Choice claims for reimbursement for costly medical treatment has the effect of denying a petitioner badly needed medicare experienced counsel whose hourly fees of $300 to $400 per hour prohibit taking on a case which normally would consume the entire reimbursement and be unconscionable. Under § 406, fees are controlled by the hearing officer or the courts under the statute and are not adequate in Medicare MA cases. This denies due process and equal protection and it has the effect of denying total meaningful access to the courts in violation of the First Amendment.

II. 42 U.S.C. § 1395w-26(b)(3) (amend. Dec. 8, 2003), (Relation to State laws), and 42 C.F.R. § 422.402 (Federal preemption of State laws) (70 FR 4733, Jan. 28, 2005), are void for vagueness. They deny due process in violation of U.S. Const. amends. [V] and [XIV], and deny equal protection of the laws. They infringe upon the Constitutional powers reserved to the people and to the States by U.S. Const. amends. [IX] and [X] to provide for the health and safety of their citizens.

U.S. Const. amend. [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. [X]

The powers not delegated to the United States by the Constitution,

Nor prohibited by it to the States are reserved to the States respectively, or to the people.

U.S. Const. amend. [V]

No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. [XIV]

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A Medicare MA preemption statute provides:

> 42 U.S.C. § 1395w-26(b)(3) **(Relation to State Laws)** The standards established under this part shall supercede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part.

A Medicare MA preemption Regulation provides:

> 42 C.F.R. § 422.402 **Federal preemption of State law.** The standards established under this part supercede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to the MA plans that are offered by MA organizations.

Both laws are facially in violation of the Ninth and Tenth Amendments as they interfere with the power reserved to the states to regulate health & safety, the professions, and specifically the practice of medicine. Both are overly broad and void in violation of Fifth Amendment due process. Both laws facially

preempt all State statutes and regulations except two (licensing and solvency) and emasculate the California Knox-Keene Health Care Service Plan Act of 1975 codified at Health & Safety Code ("H&S") sections 1340-1395.6 as they apply to Medicare MA plans. This Act sets State standards for the practice of medicine within the State relating to medical necessity determinations, re-determinations and their review by persons required to be licensed to practice medicine and to be certified by specialty boards. Medical necessity decisions are inherently part of the practice of medicine.

Both laws specifically interfere with the practice of medicine governing the Independent Medical Review System for a "disputed health care service" which is a finding that a service is "not medically necessary". A disputed health care decision relates to the practice of medicine and is not a coverage decision.

The United States was not delegated the power in the Constitution to regulate the intrastate practice of medicine which traditionally is a health and safety matter reserved to the States. The United States frequently relies upon U.S. Const. Art. I, § 8 as the source of its power to regulate the activities of its citizens "The Congress shall have the power to regulate Commerce with foreign Nations *and among the several States*, and with Indian Tribes". This power is often abused and makes a mockery of Federalism.

More than fifty seven years ago, in deciding *United States v. Oregon State Medical Society*, 72 S. Ct. 690, 343 U.S. 326, 96 L. Ed. 978 (1952), this Court held that federal intervention in intrastate medical activities is off limits to federal intervention, that "The sale of medical services by Doctor Sponsored Organizations within the state of Oregon is not commerce within the meaning of the constitutional grant of power to Congress to regulate Commerce". In *Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004, 421 U.S. 792, 44 L. Ed. 2d 472 (1975), the Court stated "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health and safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."

Since the adoption of the above preemption statute and regulation, the California Department of Managed Health Care has declined to enforce the provisions of the Knox-Keene Act for petitioner and all other Medicare MA enrollees but enforces it in non Medicare HMO cases. This violates Fifth & Fourteenth Amendments due process and denies equal protection of the law.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition for certiorari, and review the judgment below.

Respectfully submitted,

ROBERT E. FRAZIER, *Pro se*
Date: November 9, 2009

CERTIFICATE OF PETITIONER, PRO SE

Petitioner hereby certifies that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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ROBERT E. FRAZIER